Michigan Law Review

Volume 70 | Issue 2

1971

Manageability of Notice and Damage Calculation in Consumer Class Actions

Michigan Law Review

COMMENTS

Manageability of Notice and Damage Calculation in Consumer Class Actions

It is precisely because the class action deters the robber barons from plundering the poor that it has been hailed as a very important supplement to law enforcement. Take away the class action and the joy of those who live off the small consumer will, as in the bad old days, be unconfined.[1]

The 1966 amendment of Federal Rule of Civil Procedure 23[2]

1. Letter from Abraham L. Pomerantz to the Financial Editor, N.Y. Times, April 25, 1971, § 3, at 22, col. 8. This letter was in response to an article by Milton Handler, *Massive Class Actions: A Liability*, N.Y. Times, April 4, 1971, § 3, at 12, cols. 3-8. *See also* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 26 RECORD OF N.Y.C.B.A. 124 (1971), 71 COLUM. L. REV. 1 (1971). A bibliography of selected materials on class actions is collected in 26 RECORD OF N.Y.C.B.A. 412 (1971).

2. Amended Rule 23 was adopted by Order of the Supreme Court, 383 U.S. 1031 (1966), along with additional amendments of the Federal Rules of Civil Procedure, on Feb. 28, 1966, effective July 1, 1966. Rule 23 presently provides:

CLASS ACTIONS

(a) *Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.*

(b) *Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:*

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

was designed in large measure to fulfill the "historic mission of taking care of the smaller guy."[3] It had been generally recognized that the classification of class actions according to jural relationships[4] under the former rule had become unworkable;[5] the rule

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

3. Statement by Benjamin Kaplan, quoted in Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST B.J. 295, 299 (1966). *See also* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969).

4. Prior to the 1966 amendments, class actions under Rule 23 were classified according to the character of the right sought to be enforced. These types of class suits became popularly known as *true* ("joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it"), *hybrid* ("several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action"), and *spurious* ("several, and there is a common question of law or fact affecting the several rights and a common relief is sought"). The label applied often determined jurisdictional requirements, the binding effect of the judgment, and the application of the statute of limitations. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937); Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937).

5. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Note, 39 F.R.D. 69, 98-99 (1966) [hereinafter Advisory

was amended with the intention of elucidating in more practical terms the proper occasions for maintaining a class action.[6] Early suits brought under the amended rule concentrated in the antitrust and securities fraud areas,[7] largely because an Advisory Committee Note appended to Rule 23 made specific mention of the likelihood that private antitrust damage suits and suits for fraud arising from a common misrepresentation would be properly maintainable as class actions.[8] Recently, federal legislation has been proposed to provide more effective consumer[9] remedies, and these proposals generally rely heavily upon the operation of Rule 23 for implementation.[10] This Comment will examine the likelihood that Rule 23, as it has been interpreted since its amendment, will provide a mechanism through which consumers may successfully resolve their grievances. The focus will be on the manageability problems of providing the requisite notice and of devising a method of calculation and distribution of damages.

I. Requirements of Rule 23

Subsection (a) of Rule 23 contains four necessary, but not sufficient, conditions that must be fulfilled if a suit is to be properly maintained as a class action.[11] These preconditions largely reflect criteria contained in the former rule.[12] However, while under the former rule the binding effect of a judgment was largely determined by the jural relationship involved,[13] it was thought that since the

Note]; Z. Chafee, Some Problems of Equity 244-58 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 702-07 (1941).

6. Advisory Note, *supra* note 5, at 99. *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433 (1960).

7. 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 562, at 76 (C. Wright ed., Supp. 1970); 3B Moore's Federal Practice ¶ 23-45[2], at 758 (2d ed. 1969) [hereinafter Moore]; C. Wright, Federal Courts § 72, at 312 (2d ed. 1970); 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1781 (1972).

8. Advisory Note, *supra* note 5, at 103.

9. The term "consumer" will be used in its broadest sense throughout this Comment. It will generally be the case that class actions are maintained when the damages suffered by individuals are an insufficient inducement to the assertion of legal rights and that only by forming a class and sharing litigation expenses does suit become feasible. Additionally, consumer class actions will ordinarily have at their roots contractual transactions from which actions for breach of contract or for related torts (*e.g.*, fraud) arise. *See* Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. Urban Law 349 (1971).

10. *E.g.*, S. 984, 92d Cong., 1st Sess. (1971) (Consumer Class Action Act of 1971); H.R. 1078, 92d Cong., 1st Sess. (1971) (amendment to the Federal Trade Commission Act). Both proposals provide that the federal courts shall have original jurisdiction in actions brought under the proposed statutes. On the general topic of possible legislative approaches, see Leete, *The Right of Consumers To Bring Class Actions in the Federal Courts—An Analysis of Possible Approaches*, 33 U. Pitt. L. Rev. 39 (1971).

11. *See* note 2 *supra*. *See also* Advisory Note, *supra* note 5, at 100.

12. 2 W. Barron & A. Holtzoff, *supra* note 7, § 562, at 63; Moore, *supra* note 7, ¶ 23.02-03, at 201; 7 C. Wright & A. Miller, *supra* note 7, § 1759.

13. *See* note 4 *supra* and accompanying text.

amended rule contemplated broader res judicata application,[14] the courts would apply more demanding standards to assure that the class was properly and adequately represented.[15] The Second Circuit Court of Appeals, the first federal appellate court to consider the adequacy of representation under the amended rule, required only that the class be represented by competent counsel and that the possibility of a collusive suit between the litigants be eliminated as much as possible.[16] Similar standards have been applied in other cases.[17] The other criteria prescribed in Rule 23(a) are either not often challenged by the defendant[18] or are so similar to other requirements that must be satisfied that courts analyze them in connection with other subdivisions of the rule.[19]

Subsection (b) of Rule 23 describes the additional elements that must be satisfied in order to maintain a class action.[20] An action must meet the requirements of one of the three categories of subsection (b). Class actions may be brought under Rule 23(b)(1) when their use will eliminate undesirable effects that might result from nonclass suits brought by or against individual members of the class. Actions brought under this subsection might well be classified as "protective" class actions, with subsection (b)(1)(A) designed to protect the party opposing the class and subsection (b)(1)(B) providing for a class action when the rights of class members not parties to the original action might otherwise be jeopardized. Subsection (b)(1)(A) provides that a class action may be brought when the prosecution of separate actions creates a risk that incompatible standards of conduct might be established for the party opposing the class. The examples suggested by the Advisory Committee—the invalidation

14. FED. R. CIV. P. 23(c)(2)-(3), set out in note 2 *supra*. The Advisory Committee realized that the court conducting the action could not predetermine the res judicata effect of its judgment, but noted:

> The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered.

Advisory Note, *supra* note 5, at 106. *See also* C. WRIGHT, *supra* note 7, § 72, at 314.

15. MOORE, *supra* note 7, ¶ 23.02-03, at 202; 7 C. WRIGHT & A. MILLER, *supra* note 7, § 1765; Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).

16. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968).

17. *E.g.*, Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *revd. on other grounds*, 438 F.2d 825 (2d Cir. 1971); Mersay v. First Republic Corp., 43 F.R.D. 465, 468-71 (S.D.N.Y. 1968).

18. *E.g.*, City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (impracticability of joinder); Fischer v. Kletz, 41 F.R.D. 379 (S.D.N.Y. 1966) (typical claims or defenses).

19. *E.g.*, Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D. Minn. 1971) (common questions of law or fact); Koehler v. Ogilvie, 53 F.R.D. 98 (N.D. Ill. 1971) (adequacy of representation and typical claims combined in analysis). *See generally* Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. IND. & COM. L. REV. 527 (1969).

20. *See* note 2 *supra*.

of bond issues or the duties of riparian owners[21]—are very different from the issues involved in the typical consumer class action. Accordingly, one commentator has urged that actions for money damages should not qualify under subsection (b)(1)(A) because the payment of damages to members of a class does not create the "incompatible standards of conduct" within the meaning of that limitation:

> This phrase implies that the separate judgments will affect an opposing party's continuing course of conduct brought into issue by the suits and not that the judgments will cause inconsistent isolated actions. In the damages example, the payment or nonpayment of money damages are single inconsistent actions which may not affect the party's continuing course of conduct.[22]

Furthermore, to the extent that a consumer class action is brought under the premise that consumers are financially unable to prosecute their grievances individually, the corresponding risk that individual suits would establish incompatible standards of conduct is reduced.[23]

Subsection (b)(1)(B) permits a class action when a judgment in a nonclass action involving a member of the class would as a practical matter jeopardize the interests of class members not parties to the suit. Except in limited instances when claims are made by many persons against a fund insufficient to satisfy all claims,[24] damage claims are unlikely to qualify under subsection (b)(1)(B). Therefore, consumer class actions are unlikely to fall within the parameters of either the subsection (b)(1)(A) or (b)(1)(B) provisions.[25]

A class action under subsection (b)(2) arises when "the party opposing the class has acted or refused to act on grounds generally applicable to the class."[26] A subsection (b)(2) suit is appropriate when the remedy applicable is "final injunctive relief or corresponding declaratory relief."[27] While the subsection does not provide that damages may never be sought or awarded, the Advisory Committee was careful to state that a subsection (b)(2) action was not appropriate when "the appropriate final relief relates exclusively or predominantly to money damages."[28] It is clear that this provision

---

21. Advisory Note, *supra* note 5, at 100.

22. Sabbey, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 540-41 (1969).

23. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), *criticized in* 44 N.Y.U. L. REV. 198, 201-02 (1969).

24. *See* Advisory Note, *supra* note 5, at 101.

25. *See* Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 823-24 (1970).

26. *See* note 2 *supra*.

27. *See* note 2 *supra*.

28. Advisory Note, *supra* note 5, at 102.

was designed primarily to allow class actions in the civil-rights field, and although the Committee expressly states that a subsection (b)(2) suit is not limited to civil-rights cases,[29] one commentator has urged that it should be so limited.[30] Although a consumer class action could conceivably be brought seeking injunctive relief, it is far more likely that consumer actions will seek primarily monetary recoveries since the economic justification for a class action procedure is based on the idea that only by forming a class are consumers likely to bring suit to recover the small damages that they individually have suffered. If, as in the case of civil-rights actions, a particular consumer cause can generate public donations to support a legal action,[31] then a subsection (b)(2) suit seeking injunctive relief could be maintained upon the requisite showing that the adverse party had acted on grounds generally applicable to the class, but otherwise few consumer class actions will be permitted under Rule 23(b)(2).

Therefore, despite an early prediction that not many subsection (b)(3) actions would be permitted,[32] the vast majority of consumer class actions are likely to be brought under this subsection. The court must make two threshold determinations in order to allow such a suit. First, it must determine that questions of law or fact common to the members of the class predominate over individual questions.[33] In the securities and antitrust fields, this requirement has generally been met in favor of the class by holding that the issue of liability arising from a common misrepresentation or a conspiracy predominates over the individual damage issues.[34] Often the courts proceed to order a single trial to determine liability and separate trials to establish damages incurred by individual members.[35] A warning by the Advisory Committee that a fraud case may be unsuitable for treatment as a class action when material variations in the representations and degrees of reliance exist[36] may explain the reluctance of courts to allow class actions in consumer fraud cases.[37] A recent California case suggests, however, that the com-

29. *Id.*

30. Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 648-49 (1965).

31. *See* Weinstein, *supra* note 6, at 435.

32. Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 567 (1966). For a later contrary conclusion, see Travers & Landers, *supra* note 25, at 824.

33. *See* note 2 *supra*. It is at this stage that the court usually examines Rule 23(a)(2). *See* note 19 *supra* and accompanying text.

34. *E.g.*, Alameda Oil Co. v. Ideal Basic Indus., 326 F. Supp. 98 (D. Colo. 1971); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966).

35. *See* FED. R. CIV. P. 23(c)(4), set out in note 2 *supra*.

36. Advisory Note, *supra* note 5, at 103.

37. Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21, 31-34 (1970); Smit,

monality of fact may be supplied by the showing of a pattern of misrepresentation.[38] Although there may be difficulties in bringing consumer class actions for fraud, in many other consumer areas the necessity of showing a predominance of common questions is not likely to be determinative.

The court must further determine under subsection (b)(3) that a class action is superior to other methods of fair and efficient adjudication of the controversy. The rule suggests four pertinent matters to be examined in making this determination,[39] the most important of which is an assessment of "the difficulties likely to be encountered in the management of a class action."[40] The other requirements of subsections (a) and (b)(3) have generally been interpreted favorably for those seeking a class action, and the assessment of difficulties in managing the suits reflects the final, and yet most substantial, hurdle faced by class action advocates. It is only recently that courts have found it necessary to focus directly on the manageability limitations to class actions as the other more preliminary objections raised by defendants have gradually been resolved in favor of maintenance of class actions.

Since the federal rule was amended in 1966, commentators and courts have forecast that a substantial burden would be placed on the court system as an increased number of class actions would be maintained.[41] In *Snyder v. Harris*,[42] the Supreme Court cited the expansion of the federal caseload[43] when it considered whether the amended federal rule had changed the then prevailing rule that plaintiffs may aggregate only commonly held claims or rights[44] in satisfying the minimum jurisdictional amount in controversy.[45] In holding that the amendment to Rule 23 did not change the interpretation of the phrase "matter in controversy" for jurisdictional purposes and that separate and distinct claims could not be aggre-

---

Are Class Actions for Consumer Fraud a Fraud on the Consumer?, 26 BUS. LAW. 1053, 1061-63 (1971).

38. Vasquez v. Superior Court, 4 Cal. 3d 800, 811-13, 484 P.2d 964, 971-72, 94 Cal. Rptr. 796, 803-04 (1971).

39. FED. R. CIV. P. 23(b)(3)(A)-(D), set out in note 2 *supra*.

40. FED. R. CIV. P. 23(b)(3)(D), set out in note 2 *supra*.

41. Frequently this assertion is supported by citation to a recent volume of Federal Rules Decisions showing the large number of class actions reported. *See, e.g.*, Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 n.1 (1971). No comprehensive statistical analysis has yet been made of the actual impact of the amended rule on the federal caseload, but it is nevertheless clear that many courts proceed on the assumption that the impact of the rule has been significant.

42. 394 U.S. 332 (1969).

43. 394 U.S. at 339-40.

44. 394 U.S. at 335-36. *See also* C. WRIGHT, *supra* note 7, § 72, at 315.

45. 28 U.S.C. § 1332 (1970).

gated, the Court resorted to the jural relationships that had prevailed under the former rule, thereby resurrecting a classification that the amended rule had sought to bury.[46] Most class actions brought under either subsection (b)(1) or (b)(2) will meet federal jurisdictional standards through compliance with the traditional aggregation requirements[47] or alternative jurisdictional provisions.[48] However, most suits sought to be maintained as class actions under Rule 23 (b)(3), which generally arise in the consumer context out of separate but similar transactions, will be denied since the rights asserted are "several" and aggregation is precluded.[49] Commentators have called for statutory modification to allow aggregation in class actions,[50] and the *Snyder* decision has been the impetus for proposed federal legislation to eliminate the requirement of a minimum amount in controversy in certain consumer areas.[51]

There is little question that *Snyder* represents a partial defeat of the purpose of the amended rule.[52] But those who argue that Rule 23 is ineffective for consumer class actions because of the limitations imposed by *Snyder* and the inadequacy of state class action procedures[53] have overlooked the significant areas in which jurisdictional amounts in controversy need not be demonstrated and have failed to foresee the impact of the federal rule upon the states. At least ten states now have rules substantially identical to the amended federal rule,[54] and additional states that generally follow the federal

---

46. *See* 394 U.S. at 343-44 (Fortas, J., dissenting).

47. By the nature of the rights involved in Rule 23(b)(1) suits, the action is likely to fall within the meaning of common and undivided rights for which aggregation is permitted. *See* C. WRIGHT, *supra* note 7, § 72, at 315-16.

48. 28 U.S.C. § 1343 (1970), which grants jurisdiction in civil-rights cases without regard to an amount in controversy, is likely to cover most Rule 23(b)(2) suits. *See* text accompanying notes 27-30 *supra*.

49. *See* Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

50. *E.g.*, C. WRIGHT, *supra* note 7, § 72, at 316.

51. *See* note 10 *supra*.

52. Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497-98 (1969); Note, *Aggregation Doctrine Continues To Limit Class Actions*, 24 SW. L.J. 354 (1970); Note, *Federal Courts and Procedure—Aggregation of Claims in Class Actions*, 37 TENN. L. REV. 103 (1969); Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1577 (1970). *Cf.* Maraist & Sharp, *After Snyder v. Harris: Whither Goes the Spurious Class Action?*, 41 MISS. L.J. 379 (1970).

53. For discussions of the various forms that class actions may take and specific state provisions, see Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Starrs, *The Consumer Class Action—Part II, Considerations of Procedure*, 49 B.U. L. REV. 407, 424-63 (1969).

54. ARIZ. R. CIV. P. 23 (Ariz. Rev. Stat. Ann. Supp. 1971); COLO. R. CIV. P. 23 (Colo. Rev. Stat. 1970); DEL. R. CHANCERY CT. 23 (Del. Code Ann. 1971); IND. R. TRIAL P. 23 (Ind. Ann. Stat., Burns Supp. 1970); MINN. R. CIV. P. 23 (Minn. Stat. Ann. 1968); MONT. R. CIV. P. 23 (Mont. Rev. Code Supp. 1971); OHIO R. CIV. P. 23 (1 Jacoby Ohio Civ. Practice 1970); S. DAK. R. CIV. P. 15-6-23 (S. Dak. Comp. Laws Supp. 1971); TENN.

rules are likely to amend their class action rules. Furthermore, state courts often look to the federal rules for direction, notwithstanding the language of their own class action statutes.[55] In the many class actions that still will be brought on the federal and state levels, it is the problem of manageability that will question the effectiveness of the class action as a meaningful device for consumers. The problem challenges the ingenuity of the courts to develop a method of handling class actions that will redress valid consumer grievances. In those jurisdictions that follow the amended federal rule, the analysis of manageability is clearly suggested by Rule 23(b)(3)(D), but in all jurisdictions with any form of class action, the assessment of manageability should be an implicit and frequently controlling determination. Particular attention should be given to the problems inherent in providing notice in Rule 23(b)(3) actions and in calculating and distributing damages.

II. Illustrative Manageability Problems—Recent Cases

The difficulties likely to be encountered in the management of large class actions are illustrated by two recent federal district court cases. Both decisions focus on anticipated problems of manageability, with one decision upholding a consumer class action and the other rejecting it. In *Eisen v. Carlisle & Jacquelin*,[56] an investor brought an action against the two major odd-lot dealers on the New York Stock Exchange alleging that they had conspired and combined to monopolize odd-lot trading and had charged excessive fees in violation of the Sherman Anti-Trust Act.[57] In a separate count, the plaintiff also charged the New York Stock Exchange with breach of the duties prescribed by the Securities Exchange Act of 1934.[58] Eisen sought to represent himself and all odd-lot purchasers and sellers between 1962 and 1966, a group estimated initially at 3.75 million investors[59] and later determined to approximate 6 million.[60] In response to defendants' motion under Rule 23(c)(1) that the class action not be permitted, the district court held that the plaintiff had not demonstrated that he could adequately represent the class

---

R. Civ. P. 23 (Tenn. Code Ann. Supp. 1970); Wash. R. Civ. P. 23 (Wash. Rev. Code 1968).

55. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 708-09, 433 P.2d 732, 742, 63 Cal. Rptr. 724, 734 (1967).

56. 41 F.R.D. 147 (S.D.N.Y.), *motion to dismiss interlocutory appeal denied*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), *revd. and remanded on the merits*, 391 F.2d 555 (2d Cir. 1968), *decided*, 52 F.R.D. 253 (S.D.N.Y. 1971).

57. 15 U.S.C. §§ 1-2 (1970).

58. 15 U.S.C. §§ 78f(b), 78f(d), 78s(a) (1970).

59. 41 F.R.D. at 151 n.2.

60. 52 F.R.D. 253, 257 (S.D.N.Y. 1971).

as required by Rule 23(a)(4); nor that he would be able to comply with the notice requirements of Rule 23(c)(2); nor that common questions predominated over individual issues of law or fact as required by Rule 23(b)(3).[61] Although the court refused to certify the class action, it did not dismiss the action in so far as it related to Eisen's individual claims, and it made no ruling on the merits of the allegations.[62]

Eisen appealed the refusal by the district court to certify the class action. The defendants unsuccessfully moved to dismiss the appeal on the ground that the order had not been final because the plaintiff was still able to pursue his individual claim.[63] Thereafter, in a widely noted decision,[64] the Court of Appeals for the Second Circuit reversed the district court's holding. The court of appeals found that common questions did indeed predominate over individual issues despite the defendants' arguments that the class of purchasers and sellers of odd-lot shares had diverse motives and interests. It remanded the case for a determination of the adequacy of representation and a resolution of the notice problems and further directed the district court to consider the mechanics involved in the administration of the action. The court carefully stated: "However, we do not express any opinion on this subject [of administrative feasibility] and we simply note that other courts in similar cases have been able to set up formulas of procedure for recovery that are applicable to an entire class."[65] Chief Judge Lumbard dissented, arguing that the impossibility of proper notice and the unmanageability of the suit precluded a class action.[66]

On remand, after an additional hearing that directed the parties to submit further data,[67] Judge Tyler—who had made the determination five years earlier that a class action was not maintainable—made detailed findings of fact based on submissions by the parties. Specifically, he found: (a) approximately 6 million shareholders had odd-lot transactions during the period in question; (b) the average shareholder had approximately 5 odd-lot transactions during this time, with an average odd-lot differential per transaction of $5.18; (c) of the 6 million shareholders, 2 million could be identified

61. 41 F.R.D. at 150-52.

62. 41 F.R.D. at 152.

63. 370 F.2d 119 (2d Cir. 1966). *See generally* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970). *Cf.* Note, *Civil Procedure-Finality of Determination Under Federal Rule 23(c)(1)*, 48 N.C. L. REV. 626 (1970).

64. 391 F.2d 555 (2d Cir. 1968), *noted in* 18 AM. U. L. REV. 225 (1968), 44 N.Y.U. L. REV. 198 (1969), *and* 44 NOTRE DAME LAW. 151 (1968).

65. 391 F.2d at 567.

66. 391 F.2d at 570-72.

67. 50 F.R.D. 471 (S.D.N.Y. 1970).

through a correlation of the defendants' records with computer tapes maintained by 14 of the largest brokerage firms;[68] (d) the names and addresses of the remaining two thirds of the class could not be identified with reasonable effort; and (e) through a random sample, it was estimated that almost 2,000 members had 10 or more odd-lot transactions during the period in question.[69] Judge Tyler also considered an analysis of the costs incurred in administration of 2 other large class actions[70] and the projected costs of providing notice to members of the *Eisen* class.[71]

Applying the criteria set forth by the court of appeals,[72] Judge Tyler had little difficulty concluding that the class was adequately represented. He noted the conduct of plaintiff's counsel as evidence of his capability and the fervor of the litigation as demonstration of the lack of collusion between the parties.[73] Recognizing that manageability posed "the most difficult question to be considered by this court,"[74] Judge Tyler considered various aspects of the problem of damage calculation and distribution. He concluded that by using the defendants' records and studies conducted for or by the Securities and Exchange Commission (SEC) on odd-lot trading it was possible to estimate gross damages without requiring the filing of individual claims by each class member.[75] Relying on the experience from the antibiotic drug cases[76] to appraise the mechanics of administration, Judge Tyler attempted to estimate the expenses of providing the necessary notice and processing of claims and concluded that the total sum required was about $500,000.[77] He further stated that claims could be proved by verification or certification by a claimant's broker-dealer or the records of the individual claimants.[78] Judge Tyler recognized the necessity of assuring that class members would share in any eventual judgment and found it appro-

68. These brokerage firms transmit their customers' orders directly by teletype to the defendants. The defendants maintain computer tapes on which are recorded the transactions of each wire firm customer. By comparing the transactional data recorded by the defendants with the names and addresses recorded by the brokers, the members of the class may be identified. 52 F.R.D. at 257.

69. 52 F.R.D. at 257, 259.

70. 52 F.R.D. at 259-60, discussing West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 40 U.S.L.W. 3166 (U.S. Oct. 12, 1971); Cherner v. Transitron Electronic Corp., 201 F. Supp. 934 (D. Mass. 1962).

71. 52 F.R.D. at 263, 267-68. *See* notes 152-53 *infra* and accompanying text.

72. *See* text accompanying note 16 *supra.*

73. 52 F.R.D. at 261.

74. 52 F.R.D. at 261.

75. 52 F.R.D. at 262.

76. *See* text accompanying notes 189-97 *infra.*

77. 52 F.R.D. at 263.

78. 52 F.R.D. at 263.

priate to consider the possibility of a "fluid class recovery," in which any unclaimed portion of a damage award would be used to benefit the entire class by applying the damage fund to reduce the odd-lot differential charged by the defendants in the future.[79] While not definitively ruling on the precise form that such a distribution scheme might take, he was satisfied that the concept had sufficient merit to assure that some method of distribution would be possible.[80] Comparing the probable administrative costs with the range of damages that would be awarded upon a finding of liability, Judge Tyler concluded: "Thus, it becomes apparent that if plaintiff succeeds on behalf of the class, there will be a substantial recovery to be distributed."[81]

Turning to the problems associated with the necessity of giving notice to the class members,[82] Judge Tyler interpreted Rule 23(c)(2) as an expression of the requirements of due process as perceived by the Advisory Committee. He interpreted the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*[83] as requiring a flexible test designed to ensure adequate representation and protection for those persons not present but bound by the judgment. Judge Tyler reasoned:

> Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.[84]

He ordered a comprehensive scheme of notice, which did not however require individual notification for each identifiable class member.[85] Despite the wording of Rule 23(c)(2)[86] and the arguments made by the defendants that any mailed notice must go to all of the approximately two million identifiable class members, the court thought it necessary to recognize that stringent notice requirements could "vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation."[87] The court concluded that the suit was a proper class action under Rule 23.[88] Since the plaintiff had indicated that he would be unable to under-

79. 52 F.R.D. at 264-65. *See* text accompanying notes 172-73 *infra.*
80. 52 F.R.D. at 264-65.
81. 52 F.R.D. at 265.
82. *See* text accompanying notes 115-23 *infra.*
83. 339 U.S. 306 (1950).
84. 52 F.R.D. at 266.
85. 52 F.R.D. at 267-68. *See* text accompanying notes 118-23 *infra.*
86. *See* note 2 *supra.*
87. 52 F.R.D. at 266.
88. 52 F.R.D. at 272.

take the cost of providing notice, the court ordered a preliminary hearing on the merits, after which it would determine if the defendants might properly be ordered to advance the cost. Although the court recognized that as a practical matter the initial allocation of the notice costs might determine whether the suit would indeed be brought, it regarded this issue as separate from that of the propriety and manageability of the class action under the federal rule.[89]

In the second case, *City of Philadelphia v. American Oil Co.*,[90] a federal court in New Jersey considered certification of four overlapping class actions brought to recover damages allegedly incurred because of violations of the Sherman Anti-Trust Act by eight major oil companies. The defendants had been indicted in 1965 under section 1 of the Sherman Act for unlawfully conspiring and combining to fix and maintain tank wagon and retail gasoline prices and for limiting the amount of gasoline available to private brand distributors and retailers in the trading area of Delaware, New Jersey, and Pennsylvania between 1955 and 1965. Additional counts charged four of the defendants with violations of section 2 of the Sherman Act for unlawful combination and conspiracy to monopolize and attempt to monopolize. The defendants entered a plea of nolo contendere on the eve of the criminal trial in 1969 after three of the class actions had been filed.[91] The complaint in each class action substantially tracked the indictment.[92]

The State of New Jersey and the City of Philadelphia combined to bring suit[93] representing

> all state and municipal governments, governmental agencies, authorities, commissions and subdivisions and all other ultimate consumers situated throughout the States of Pennsylvania, New Jersey and Delaware which have purchased, directly or indirectly, for use and not for resale,[94]

gasoline from the defendants between 1955 and 1965. The second consumer class action[95] was brought by McCloskey and Company, a large construction corporation, seeking to represent all individuals, corporations and other entities (but excluding governmental units)

89. 52 F.R.D. at 272.

90. 53 F.R.D. 45 (D.N.J. 1971).

91. *See* 53 F.R.D. at 47-49.

92. 53 F.R.D. at 49.

93. Although the actions had been commenced independently, the parties filed a consolidated and amended complaint prior to trial. 53 F.R.D. at 48.

94. 53 F.R.D. at 48.

95. The court refers to the three class suits as "consumer class actions" throughout the opinion. The focus of this Comment is primarily on the subclass of the Philadelphia-New Jersey class comprised of consumer motorists who purchased gasoline at retail prices. *See* text accompanying notes 109-11 *infra*.

situated in the trading area that had purchased gasoline from the defendants in tank wagon quantities or at tank wagon prices for their own consumption. The court estimated that this class had approximately 10,000 members.[96] The final consumer class action was brought by the Yellow Cab Company, seeking to represent "all individuals, partnerships, corporations and other entities engaged in the business of furnishing taxicab, limousine and related services,"[97] but excluding governmental units. This class contained over 500 members, but Yellow Cab accounted for almost one quarter of the taxicabs operating in the three-state area.[98] Potential overlap among the classes was solved by agreements among the plaintiffs.[99]

The defendants argued that common questions did not predominate over individual questions as required by subsection (b)(3) and that the plaintiffs could not overcome the manageability difficulties that would arise in the class actions because of the complexity of the gasoline pricing structure.[100] As to the Philadelphia-New Jersey class, the defendants also challenged the adequacy of representation and the additional requirement of Rule 23(a)(3) that the plaintiffs' claims be typical of the claims of the class.[101] By applying the *Eisen* test of adequacy of representation[102] and by separating the issue of the conspiracy from the issues of individual damages, the court found that all the classes satisfied the requirements of Rule 23(a).[103] The court concluded that the Philadelphia-New Jersey plaintiffs did have claims typical of the class they purported to represent because "proof needed to demonstrate [the conspiracy] will be the same irrespective of whether one purchased in five hundred gallon quantities or from retail service stations."[104]

Recognizing the significance of the *Eisen* decision, which had established expansive parameters for Rule 23(b)(3) by certifying a class of six million persons, the court sought to distinguish *City of Philadelphia* because of the complexity of the gasoline pricing structure, and particularly because of the absence of an average transaction or price differential. The court also noted that it did not have a structural analysis of the industry prepared by independent parties, which had been present in the *Eisen* case in the form

96. 53 F.R.D. at 70.

97. 53 F.R.D. at 49.

98. 53 F.R.D. at 49, 70.

99. 53 F.R.D. at 48-49, 53.

100. 53 F.R.D. at 59-61. For a general discussion of the gasoline pricing structure, see 53 F.R.D. at 58-59.

101. 53 F.R.D. at 60.

102. *See* text accompanying note 16 *supra*.

103. 53 F.R.D. at 68.

104. 53 F.R.D. at 68.

of SEC-sponsored studies.[105] The court also distinguished the precedent provided by various antibiotic drug cases,[106] stating that those cases rest upon the

> belief that a total damage award could be established for the entire class. Such a total damage figure against which damages may be claimed by individuals would be much more difficult to achieve in the consumer actions pending in this Court. Even if such a figure could be ascertained, significant problems would remain. Unlike the antibiotic price structure, the gasoline price structure was much less stable and more complex because of the various methods of sale, thus creating problems for awarding individual damages.[107]

Despite this complicating factor, the court certified the McCloskey and Yellow Cab classes, relying heavily on the business records that members of these classes presumably had maintained and that would provide a basis for calculation of individual damages.

The court divided the Philadelphia-New Jersey class into three subclasses in order to assess the manageability problems.[108] The court certified the subclass of governmental agencies and authorities, relying again on the records of quantity, quality, and price of gasoline that the class members had kept. As to the nongovernmental components of the Philadelphia-New Jersey class, the court divided the class into tank wagon purchasers and retail purchasers. The court recognized that the tank wagon subclass corresponded precisely with the McCloskey class, which it had certified. But as to the nongovernmental purchasers who had purchased at retail—namely, motorists who had purchased gasoline at pump prices—the court found that "the problems inherent in administering damage claims, if liability and a general level of damages are established, are staggering."[109]

Although recognizing that individual motorists had purchased more gasoline than all other ultimate users combined, the court felt constrained to find this class unmanageable, and therefore rejected certification of the class action.[110] The court felt that, unlike the McCloskey, Yellow Cab, and governmental classes, individual consumers would not have the necessary records of purchase to allow a calculation of individual damages. Since many purchases had been made in cash and the defendants did not possess the credit card statements of charged purchases for the relevant period, the court

105. 53 F.R.D. at 63-64.

106. *See* text accompanying notes 189-210 *infra*.

107. 53 F.R.D. at 65.

108. 53 F.R.D. at 70-71.

109. 53 F.R.D. at 71.

110. 53 F.R.D. at 72-73.

concluded that a distribution of damages to the class would be impossible regardless of a finding of the total damages incurred by the class. Furthermore, the court rejected the notion of a fluid class recovery that had been considered in the *Eisen* case:

> Such a solution to the problems of awarding damages to individual claimants is not realistically available for the group here under consideration. The motorist who purchased gasoline from a retail station during the relevant period is still likely, if he has not moved out of the trading area, to continue his purchases of gasoline. However, he will be joined by many persons who were either not old enough to have had a driver's license or were not residing in the trading area between 1955 and 1965. Any fluid class recovery would be a windfall to them and a deprivation to the motorist entitled to recovery. This Court, believing that the composition of the motoring public which purchased from retail stations has changed considerably during and since the alleged conspiracy ended, concludes that there can not be a fluid class recovery for this group of the Philadelphia-New Jersey class.[111]

The irony of the court's decision is plain. The class actions sought on behalf of large volume purchasers, such as governmental agencies and business entities—for whom gasoline is a significant component of their costs and for whom an individual suit is likely to be financially feasible—are permitted. But a class action, seeking to represent the "smaller guy," for whom no alternative means of recovery are feasible, is not permitted, despite the express realization that "the bulk of the ill-gotten gains reaped by defendants through their assumed conspiracy will remain untouched within their corporate coffers."[112]

Eisen and *City of Philadelphia* provide a framework around which to analyze two of the most significant manageability problems—the notice that must be given to absent class members when a Rule 23(b)(3) class action is proposed and the procedures that will facilitate the calculation and distribution of damages to members of the class without overwhelming court time and resources.

III. Manageability of Notice Under Rule 23(c)(2)

Class actions brought under the amended federal rule are intended to determine the rights of all persons, present or absent, whom the court finds to be members of the class.[113] In *Hansberry v. Lee*,[114] the Supreme Court held that class actions must fairly ensure the protection of the interests of absent parties in order to comply

111. 53 F.R.D. at 72.

112. 53 F.R.D. at 73.

113. Fed. R. Civ. P. 23(c)(2)-(3), set out in note 2 *supra*.

114. 311 U.S. 32 (1940).

with due process. Only when absent members of the class are adequately represented will the judgment be given res judicata effect. Under the new rule the problem of absent parties will be most prominent in subsection (b)(3) actions, in which a class representative is likely to commence suit without consultation with other class members. Rule 23 therefore provides that absent members may exclude themselves from the class or enter an appearance through counsel. These members are to be given notice of any action and of the options available to them. Specifically, the rule provides:

> [Rule 23 (c)(2)] In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the *best notice practicable under the circumstances,* including individual notice to all members who can be identified through *reasonable effort.* The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.[115]

It was with this requirement in mind that the Second Circuit in remanding the *Eisen* case cautioned that an evidentiary finding that many members of the *Eisen* class could be identified with reasonable effort, and a subsequent failure of the plaintiff to furnish individual notice to those class members, might well require dismissal of the class suit.[116] The requirement of individual notice also contributed to the decision in *City of Philadelphia* to deny certification of the class action because of the problems that would arise in attempting to give notice to the members of the Philadelphia-New Jersey subclass.[117]

In *Eisen* Judge Tyler subsequently found that two million members of the class were identifiable,[118] and the defendants argued that individual notice should be given to each of these members. Although noting that the argument was not without merit, Judge Tyler rejected it because "such notice is not compelled by the standards of due process and Rule 23(c)(2) in the context of this case."[119] Instead, he proposed a three-stage notice plan: (1) individual notice

115. FED. R. CIV. P. 23(c)(2) (emphasis added).

116. 391 F.2d at 570. The plaintiff had asserted from the outset that he would not be able to pay for the forms and methods of notice ordered by the court. 52 F.R.D. at 269.

117. 53 F.R.D. at 71.

118. He found that the remaining 4 million members could not be identified "with reasonable effort." 52 F.R.D. at 257.

119. 52 F.R.D. at 267.

would be given to each of the member firms of the New York Stock Exchange and to all commercial banks with large trust departments in an attempt to provide many class members with indirect but nevertheless effective notice;[120] (2) individual notice would be sent to the 2,000 identifiable members of the class who had conducted ten or more odd-lot transactions during the relevant period,[121] and to 5,000 additional class members selected at random;[122] and (3) notice by publication would be provided in the *Wall Street Journal* and in the *New York Times, San Francisco Chronicle, San Francisco Examiner,* and *Los Angeles Times* since New York and California had the largest number of shareholders of all states involved.[123]

The precise conflict that *Eisen* raised, namely, the balancing of the notice required by Rule 23(c)(2) with the policy consideration that "expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important,"[124] has been anticipated by a number of commentators.[125] To a substantial degree, Judge Tyler's attitude toward the policy behind the notice requirement of Rule 23(c)(2) and his specific plan for providing notice reflect the prevailing consensus of the commentators.[126] Central to this position is the finding that Rule 23 was an attempt by the Advisory Committee to embody the requirements of due process in the class action rule and that "Rule 23(c)(2) does not add to these requirements; it simply formulates guidelines for a particular kind of notice in a particular kind of action."[127] The Advisory Committee was avowedly attempting to incorporate in subsection (c)(2) the due process requirements that the Supreme Court had set forth in *Hansberry* and

120. 52 F.R.D. at 267.

121. 52 F.R.D. at 267. The district court hoped thereby to comply with the suggestion of the court of appeals that notice should be given to those persons who "may possess enough of a stake in the proceedings to justify personal intervention." 391 F.2d at 569.

122. 52 F.R.D. at 267. Notice to members selected at random is designed to assure that any significant subclass that might challenge the adequacy of the plaintiff's representation would come to the attention of the court. Expressions of displeasure would cause the court to re-examine the adequacy of representation. 391 F.2d at 563.

123. 52 F.R.D. at 268. *See also* Appendix A, Geographic Distribution of Shareowners of Public Corporations, 52 F.R.D. at 273.

124. 52 F.R.D. at 266.

125. Homburger, *supra* note 53, at 637-47; Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws,* 116 U. PA. L. REV. 889, 905-19 (1968); Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139 (1969); Note, *Federal Rule 23(c)(2)—Notice in Class Actions—Mullane Reconsidered,* 43 TULANE L. REV. 369 (1969).

126. *See, e.g.,* the forms of notice suggested in Comment, *supra* note 125, at 918.

127. 52 F.R.D. at 266.

Mullane.[128] Some commentators have argued that since the Advisory Committee had this limited purpose in drafting subsection (c)(2), a showing that it had mistakenly interpreted the *Hansberry* and *Mullane* mandates would be sufficient to permit a judicial end run around the individual notice requirement as long as a court complied with the "correct" notions of due process.[129] To that end, *Hansberry* has been interpreted as requiring an adequacy of representation that may be assured by means short of individual notice to all identifiable class members,[130] and *Mullane* has been interpreted as requiring a balancing of interests between the form of reasonable notice required and the "practicalities and peculiarities" of the litigation context.[131] Other commentators have even suggested that the Committee's interpretation of *Hansberry* and *Mullane* was not only faulty, but also unnecessary since the concept of due process in representative actions may not require *any* notice when there is a direct and compelling state interest or a basis for presuming consent of class members.[132] Those calling for a circumvention of the literal impact of the individual notice requirement have sought to explain the flexible application of the notice mandate by focusing on the "reasonable effort" or "best notice practicable under the circumstances" as authorization for the use of judicial discretion.[133]

This approach to Rule 23(c)(2) would be significantly undermined, however, by any showing that the Advisory Committee intentionally embodied within the notice requirement a more stringent standard than that compelled by due process. The Preliminary Draft of the Amendments to the Rules of Civil Procedure,[134] published in 1964, contained the following notice provision under subsection (c)(2):

> To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.[135]

128. Advisory Note, *supra* note 5, at 107.

129. *E.g.*, Note, 29 MD. L. REV. 139, *supra* note 125, at 153-54.

130. *E.g.*, Z. CHAFEE, *supra* note 5, at 232-37; Note, 29 MD. L. REV. 139, *supra* note 125, at 142-43.

131. *E.g.*, Comment, *supra* note 125, at 911-15; Note, 29 MD. L. REV. 139, *supra* note 125, at 143-50.

132. Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1 (1970).

133. *E.g.*, Note, 29 MD. L. REV. 139, *supra* note 125, at 151-54. *Contra*, Note, *Class Actions Under Amended Rule 23: Three Years of Judicial Interpretation*, 49 B.U. L. REV. 682, 704 (1969).

134. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 34 F.R.D. 325 (1964) [hereinafter *Preliminary Draft*].

135. *Id.* at 386.

Although this subsection was substantially altered before adoption in 1966, the Advisory Committee Note to that provision, in which the drafters expressed their belief that they had fulfilled the demands of due process, remained virtually unaltered between the 1964 and 1966 versions.[136] In other words, the Committee felt that the 1964 notice provision already satisfied the due process requirements of *Hansberry* and *Mullane*. The Committee's decision to propose more onerous notice standards must have reflected either a revised notion of the due process requirements or an intention to promote another policy objective.

The Advisory Committee recognized that the proposed amendment of Rule 23 was a substantial deviation from the former rule, most notably in the provision that all members of the class would be included in the judgment;[137] previously the extent of the judgment was determined by the nature of the rights adjudicated. Acknowledging the innovations contained in the Preliminary Draft, the Committee specifically solicited comments from the bench and the bar regarding subsections (b)(3) and (c)(2).[138] The response was not overwhelmingly positive,[139] and much of the criticism revolved around the binding effect that the Committee intended would be given to judgments affecting absent persons who had taken no affirmative action either to be included or excluded from the class or who had received no notice that a suit was being brought in their behalf.[140] Since the incomplete and inconsistent application of res judicata effects under the provisions of the former rule had been a principal source of its difficulty,[141] the Committee may well have been unwilling to abandon this aspect of the rule revision. It did recognize that the objection to giving binding effect to class actions based merely on common questions under Rule 23(b)(3) could be partially mitigated by a strong notice provision that would increase the opportunity for unwilling persons to exclude themselves from the class.[142] If, indeed, this was the reason for the alteration of the notice provision between 1964 and 1966, and that provision was not merely a reassessment of the Committee's concept of due process, then the requirement that

136. *Compare* Advisory Note, *supra* note 5, at 106-07, *with Preliminary Draft, supra* note 134, at 394-95.

137. *See* text accompanying notes 113-15 *supra*.

138. *Preliminary Draft, supra* note 134, at 395.

139. *E.g.*, COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE—JUDICIAL CONFERENCE—NINTH CIRCUIT, REPORT, 36 F.R.D. 209, 222-26 (1964); *id.*, SUPPLEMENTAL REPORT, 37 F.R.D. 71, 71-72, 76-77, 79-85 (1965); *id.*, SECOND SUPPLEMENTAL REPORT, 37 F.R.D. 499, 500, 520-23 (1965).

140. *See* Frankel, *supra* note 3, at 299-300; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397 (1967).

141. Advisory Note, *supra* note 5, at 98-99; Z. CHAFEE, *supra* note 5, at 250-58.

142. SUPPLEMENTAL REPORT, *supra* note 139, at 81-82.

individual notice be given to identifiable members cannot be dismissed as an error of interpretation. Instead, it must be regarded as a mechanism intended to allow potential class members a meaningful opportunity to withdraw from the class. As such, its literal application cannot be avoided by a finding that its terms are more stringent than minimal compliance with due process would otherwise dictate.

On balance, the approach offered by Judge Tyler is a more responsive interpretation of Rule 23(c)(2) and may well be a more accurate interpretation of the intended operation and scope of the notice provision. The deficiency of the "trade-off" analysis is that it amounts to little more than speculation. More importantly, it runs counter to at least one expression of the purpose of the amended rule. Consider in this regard the personal reflections on the notice provision by Professor Benjamin Kaplan, the Reporter to the Advisory Committee:

> Again, the critics undervalued the (c)(2) notice, even when considered apart from the discretionary notice possibilities of subdivision (d). In particular cases it may be practical to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to attain becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up. Notice which is fair in the circumstances of the case is a constitutional requirement. We can therefore expect courts to work toward providing the best practicable notice, as indeed (c)(2) in terms requires.[143]

The approach taken by Judge Tyler in arriving at his three-stage notice provision in *Eisen* mirrors Professor Kaplan's interpretation of the purpose of Rule 23(c)(2).[144] Furthermore, vesting the judge with discretion to mold the parameters of the class action is perhaps the most significant general feature of the amended rule[145] and is consistent with the approach taken in *Eisen*.

Providing notice to the members of a large class, even under a liberal interpretation of Rule 23(c)(2), can be a costly proposition.

143. Kaplan, *supra* note 140, at 396.

144. 52 F.R.D. at 267-68, citing Kaplan, *supra* note 140.

145. *See* the dissent of Justice Black to the adoption of the amended rule at 383 U.S. 1031, 1035 (1966):

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that "class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise."

See also Z. CHAFEE, *supra* note 5, at 288-95; Frankel, *supra* note 3, at 301.

It is not surprising then that courts have already been presented with the issue of the allocation of the expenses of providing notice. In *Eisen*, the district court recognized that as a practical matter the allocation of expenses might determine whether the plaintiff could proceed with the action.[146] Although the court of appeals assumed that the plaintiff would have to bear the costs of notice,[147] the district court felt that the issue was not conclusively determined for the circuit[148] and ordered a preliminary hearing on the merits after which it would decide if the defendants might properly be required to advance the costs of providing notice. In *City of Philadelphia*, counsel for the Philadelphia-New Jersey class agreed to pay the costs of notice, and the court found it unnecessary to analyze the problems of notice in depth because other factors were dispositive of the case.[149] It is important to recognize, however, that the practical effect of the allocation of costs on the ability of the plaintiff to bring suit is not the only context in which the scope and costs of notice are relevant. The ultimate costs of notice will be deducted from any recovery the class might receive before any funds are distributed to class members.[150] To the extent that the costs of notice are substantial because of the wide scope of notice ordered, it may reduce the likelihood that significant funds will remain after the costs of litigation are paid[151] and influence a court to refuse certification of a class. In *Eisen*, for example, the court determined that the cost of providing notice through its three-stage plan would amount to approximately $21,720;[152] and if it had ordered individual notice to the 2 million identifiable members of the class the cost would have exceeded $200,000.[153] Since the court estimated that even a minimal recovery from the defendants would approximate 22 million dollars when trebled,[154] the impact of a wider scope of notice would not

146. 52 F.R.D. at 269-70.

147. 391 F.2d at 568.

148. "Indeed, despite the apparently unequivocal language in Eisen II . . . the Court of Appeals for this circuit has indicated in a subsequent opinion that the question is still an open one. Green v. Wolfe Corp., 406 F.2d 291, 301 n.15 (2d Cir. 1968)." 52 F.R.D. at 269.

149. 53 F.R.D. at 57.

150. *See* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 725, 731, 747 (S.D.N.Y. 1970), *affd.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 40 U.S.L.W. 3166 (U.S. Oct. 12, 1971), discussed in text following note 188 *infra*.

151. Just how notice can be worded which could alert so large a "class" to the possibility that proceedings in the Southern District, if carried forward, would someday enrich each by a few dollars, if there be anything left after expenses and attorneys' fees, is a mystery to me.
Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968) (Lumbard, J., dissenting).

152. 52 F.R.D. at 267-68 (individual notice: $1,000; notice by publication: $20,720).

153. 52 F.R.D. at 260.

154. 52 F.R.D. at 265. Because the odd-lot differential had been lowered by 5 million dollars per year as of 1966, the court was able to estimate a reasonable range of recover-

have been determinative. But it is not difficult to envision a case in which a court would refuse certification on the ground that the costs of litigation threatened to exceed any damage award that the court could foresee at that stage of the litigation. Even when the plaintiff is able to provide the notice ordered or the court determines through a preliminary hearing that the defendant ought to advance the costs of providing notice, courts should be reluctant to prescribe extensive notice that will only reduce the ultimate recovery. The various constraints on the operation of class actions that arise from a literal application of Rule 23(c)(2) are likely to be avoided through court-ordered notice that is more consonant with the policy and intention embodied in the amended federal rule.

IV. Manageability of Calculation and Distribution of Damages

To the extent that the class action mechanism is designed to induce individuals to litigate small but valid claims—and there can be no doubt that this is a major goal of the class action—the primary focus on manageability must eventually be directed to the desired end result: the actual recovery of losses by individual members of the class. If, after months or years of litigation, volumes of testimony, and thousands of court hours, the prospects of distribution of damages to class members are dim because of the impossibility of proof of damages or insurmountable administrative burdens and costs, then the class action mechanism is inadequate for its designed purpose. Indeed, the courts have generally recognized the importance of determining that eventual distribution is possible (assuming that liability can be established) before undertaking full-scale proceedings. This factor was recognized in both the *Eisen*[155] and *City of Philadelphia*[156] decisions.

An analysis of the distribution process currently utilized to administer damages in class actions reveals serious limitations, which challenge the ability of the courts to fashion a manageable remedy. These limitations will be examined, as will a possible alternative to

able damages with which to compare the anticipated costs of litigation. Generally, such data are not likely to be available to courts at this stage of the litigation. This will lead courts to make conservative estimates of recoverable damages, thus increasing the impact that a wide scope of notice will have on the decision of the court to grant or refuse certification of the class.

155. "Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." 391 F.2d at 567.

156. "It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." 53 F.R.D. at 72.

the current damage distribution procedure—the fluid class recovery. The proposed alternative compensates for the shortcomings of the present distribution mechanism and has the potential of relieving the court of any active role in this distribution process, while at the same time assuring the rights of the defendant and the vitality of the class action rule.

A. *Present Distribution Procedure*

The procedure by which damages are presently calculated, proved, and distributed in class actions does not differ significantly from the process by which damages are ordinarily handled in the nonclass action context. Upon a finding of liability, the court may direct under Rule 23(d)[157] that class members be informed that liability has been established and that damage claims may be submitted. The court may additionally provide a claim form to facilitate a uniform system of claim verification. When the defendant has detailed records from which damages may be calculated, no appearance by individual members of the class need be required. When defendants' records are not complete, members' claims may be submitted to a committee of counsel for a determination of those claims that are acceptable to both sides, with challenges decided by the court.[158] Once the total amount of provable damages is established, pro rata deductions for litigation expenses such as notice and attorneys' fees may be made, with the remainder distributed to the individual class members.[159]

This method of damage calculation and administration has serious limitations that result from its failure to accept and accommodate the differences between ordinary party litigation and the class action. As noted in *City of Philadelphia*, it is the difficulty of administering the damage distribution process that poses a serious threat—and in the case of the Philadelphia-New Jersey nongovernmental subclass, the fatal blow—to effective utilization of the class action mechanism.[160]

One limitation of the present system, which may only be temporary, arises from the fact that individual consumers are not likely to retain the records necessary to prove actual damages in the sense ordinarily contemplated in the litigation context. Since the damages per individual are small in consumer class actions,[161] the consumers are unlikely to retain records, as they might in large dollar transactions or as a business retains records for financial reporting pur-

157. *See* note 2 *supra*.

158. *See* 53 F.R.D. at 72.

159. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

160. 53 F.R.D. at 73-74.

161. Kalven & Rosenfield, *supra* note 5, at 684-86.

poses. While the logical alternative is to use the defendants' records, such records may not be available in cases when the alleged illegal transaction transpired years before the litigation. For example, in *City of Philadelphia*, the alleged antitrust violations occurred between 1955 and 1965; records going back fifteen years, in some instances, would be required to substantiate those damage claims.[162] The situation is further exacerbated by the complexity of class action suits, which may result in years of litigation before liability is established and attention is finally directed to proof of damages.[163] It is likely that as the parameters of the class action rule are gradually established class action litigation will be expedited. But at least in the short run the inherent time lag between the illegal transactions and the stage of litigation when damage proof is to be submitted decreases the probability that consumers will be able to satisfy the traditional standards of damage proof.

A more substantial limitation on the present procedure results from the use of a committee of counsel to determine damage claims acceptable to both parties.[164] This process is premised on the good faith efforts of the parties to minimize the active role of the court in determining individual claims. At the same time, the defendant must be assured of due process in the determination of damages and may therefore invoke the traditional procedural devices available to him. Thus, the defendant may seek transactional data from all class members, requests to admit, depositions, and admissions.[165] In the separate trial that may be ordered to determine damages,[166] the defendant presumably can seek jury determination of asserted damage claims.[167] This combination of procedural tactics, many of which are legitimate means of protecting the defendant's property rights, nevertheless increases the costs and effort of litigation to each class member. Even after a determination of liability, the class member may regard the costs and effort of providing proof as exceeding the value derived from even full recovery of his claim, especially when his individual claim is small.

Perhaps the most serious limitation presented by the traditional damage proof and distribution process is that it directly contradicts

---

162. Proof of damages might have been eased had credit card statements been available. Neither plaintiffs nor defendants, however, maintained such statements. 53 F.R.D. at 72.

163. It took five years of litigation before the class action in *Eisen* was certified. *See* note 56 *supra*.

164. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71 (D.N.J. 1971).

165. Handler, *The Shift from Substantive to Procedural Innovation in Antitrust Suits*, 71 COLUM. L. REV. 1, 7 (1971).

166. *See* text accompanying note 35 *supra*.

167. *Cf.* Ross v. Bernhard, 396 U.S. 531, 541 (1970). The rationale of the Court in allowing a jury trial in a stockholders' derivative suit seems applicable to class actions.

the policy adopted by the Advisory Committee in the amended rule, which provides that all members of the class will be included in the judgment unless they take affirmative action to be excluded from the class.[168] This deliberate decision to require persons to opt out of the class, instead of requiring affirmative action for inclusion in the class, was designed to advance the broad application of Rule 23(b)(3) actions. Although applied to the initial formation of the class, the theory of automatic inclusion is equally appropriate at the damage stage:

> If, now we consider the class, rather than the party opposed, we see that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.[169]

Admittedly, class members will probably be less hesitant to file damage claims than they would have been to have affirmatively joined the class in the first place, but timidity and unfamiliarity are likely to continue to discourage filing by significant numbers of class members. Nonetheless, in *City of Philadelphia*, the court expressly held that affidavits would not be sufficient, and that individual motorists would have to resort to additional means of proof such as itemized deductions on income tax returns to prove gasoline purchases.[170] In *Eisen*, the court recognized that individual investors would have to reconstruct their odd-lot transactions during the years in question, with the assistance of their stockbrokers if necessary.[171] The burden of complying with these standards of proof, as well as the inherent limiting factors of requiring affirmative action, combine to pose a serious threat to the prospects of assuring effective adjudication through class actions under the traditional procedure of damage calculation. This has led courts to seek alternative methods of calculation that alleviate the necessity of proving individual damages. One such possibility is the fluid class recovery.

B. *The Fluid Class Recovery*

In considering the mechanics of the distribution of recovery in *Eisen*, Judge Tyler discussed the fluid class recovery as an alternative to personal and individual recoupment of damages.[172] Under this

168. FED. R. CIV. P. 23(c) (3), set out in note 2 *supra*.

169. Kaplan, *supra* note 140, at 397-98.

170. 53 F.R.D. at 72-73.

171. 52 F.R.D. at 263-64.

172. Judge Tyler noted that this form of recovery had been suggested by the plaintiff, who had been represented in the early stages of the litigation by Pomerantz, Levy,

distribution theory damages would be distributed to the class as a whole, rather than directly to individuals. While individuals would be permitted to recover damages they could prove, the unclaimed remainder of gross damages would be recovered from the defendants by reducing the odd-lot differential charged in subsequent transactions until such time as the balance of the damages is returned to the class. A fluid class recovery would assure that the actual damages suffered would be returned to the class, albeit in a less direct manner than if all the members of the class had filed individual claims.

A distribution system based on the concept of a fluid class recovery would largely alleviate the limitations in existing distribution formulas. Upon a determination of liability, the court would simply undertake to establish gross damages, *i.e.*, the aggregate damages suffered by the class as an entity. Of course, such a determination may not always be possible, particularly in industries in which constantly varying markups and costs make an assessment of damages on a per-unit or average-transaction basis impossible. In the *Eisen* case, the court expressly found that gross damages could be calculated because the odd-lot differential was a recurring, standard charge that could be analyzed to yield the average illegal margin charged.[173] At this stage of the litigation process the defendant would be permitted to contest the computation of damages by offering proof of varying margins or by demonstrating that the illegal margin was not charged in all transactions.[174] In *City of Philadelphia*, the defendants in fact did offer evidence of the complexity of the gasoline pricing structure, which might have precluded any determination of gross damages.[175] By this process, the defendant would have ample opportunity to defend his property by countering the plaintiff's allegations and proof of damages.

Once gross damages are determined, the court would in essence establish a damage fund. The subsequent steps in distributing the fund would be similar to distribution systems used in class actions that are settled out of court[176] with judicial approval under Rule 23(e). Deductions would be made from the fund to cover litigation expenses, with the remainder available for distribution to the class.

Haudek & Block of New York City. *See* 370 F.2d at 119; 391 F.2d at 559. Abraham Pomerantz, an active advocate of the class action, suggested the gradual recoupment of damages through a reduction in the odd-lot differential in *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1260-65 (1970), under the heading "The 'Cy Pres' Doctrine in the Class Action." *See* text accompanying note 1 *supra*; Pomerantz & Haudek, *Class Actions*, 2 REVIEW OF SECURITIES REGULATION 937 (1969).

173. 52 F.R.D. at 257.

174. *But see* Handler, *supra* note 165, at 6-7.

175. 53 F.R.D. at 58.

176. *See generally* Dole, *supra* note 41.

Those members of the class who have retained their transactional records and could satisfy the traditional standards of proof would be invited to file claims that would be examined through a committee of counsel or a random verification process.[177] Since the amount of damages for which the defendant is liable is fixed by the determination of gross damages, the defendant has little incentive to thwart efforts at claim verification or to discourage the filing of claims by dilatory tactics. The fluid class recovery thus allows those persons who actively assert their rights and prove their claims to be awarded damages in direct relation to the proof that they offer.[178] At the same time, the distribution procedure complements the policy of the Advisory Committee[179] by offering a general recovery even to those class members who have not taken affirmative action by filing claims.

1. *Precedent for the Fluid Class Recovery*

Judge Tyler stated in *Eisen* that there is "respectable precedent" for the fluid class recovery.[180] The cases cited by Judge Tyler not only presage the advent of the fluid class recovery; more importantly, they provide an insight into the ultimate question whether fluid class recovery solves the manageability problems of class actions.

In *Bebchick v. Public Utilities Commission*,[181] the plaintiff challenged an order by the Public Utilities Commission of the District of Columbia authorizing an increase in the fare charged Transit users. The District of Columbia Court of Appeals determined that the Commission had made errors in calculating net operating income, which resulted in an understating of the rate of return earned by Transit operations. The court concluded that the fare increase, amounting to a nickel on individual token purchases, should not have been granted. Although the plaintiff had sued in his own behalf and not as a representative of the class of Transit users, the court prescribed a broad remedy: "It is not feasible to require refunds to be made to individuals who paid the increase. Nevertheless, the amount realized by Transit from the increase must be utilized for the benefit of the class who paid it, that is, those who use the Transit."[182] To that end, the court ordered the Transit to establish a fund in the amount of the illegal overcharge to be used for the purpose of benefiting Transit users in any rate proceedings pending or thereafter instituted. Recognizing that the actual amount charged or collected might not be available in cash, the court permitted the

177. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71 (D.N.J. 1971).

178. *See generally* Kaplan, *supra* note 140, at 397.

179. *See* text accompanying notes 168-69 *supra*.

180. 52 F.R.D. at 264.

181. 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

182. 318 F.2d at 203.

establishment of a reserve or special account on the books of the Transit. The utilization and disposition of the fund was left to the discretion of the Commission with regulatory authority over the Transit.

In *Daar v. Yellow Cab Co.*,[183] the plaintiff sought to bring a class action against a cab company, alleging that the company had set its taxicab meters to charge rates in excess of those authorized by the Public Utilities Commission of the City of Los Angeles. In separate counts, the plaintiff offered to represent two subclasses of taxicab passengers: those who had paid fares in script, known to the defendants because of records kept of script sales, and those who had paid taxicab fares in cash. The superior court sustained a demurrer by the defendant and transferred the case to the municipal court after determining that the plaintiff could not maintain a class action and therefore could not satisfy the jurisdictional requirements to bring suit in the superior court. In reversing the superior court, the California supreme court referred to the issue of damage calculation and distribution at numerous points in its opinion. The court, taking the plaintiff's allegations of fact as true, found that the defendant could compute the amount of the overcharges from records in its possession and that it would therefore not be necessary for individual members of the class to make personal appearances to recover the full amount of the overcharges.[184] In a footnote,[185] the court discussed a suggestion made by the State of California as amicus curiae that the total amount of overcharges should be deposited with the superior court or an acceptable trustee and damages distributed to those who could identify themselves as class members. At the end of seven years, the funds would be presumed abandoned in accordance with California law. The court declined to rule on the merits of this proposal because it felt that such matters should be determined by the trial court.[186]

183. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

184. 67 Cal. 2d 716, 433 P.2d at 747, 63 Cal. Rptr. at 739.

185. 67 Cal. 2d at 715 n.15, 433 P.2d at 746 n.15, 63 Cal. Rptr. at 738 n.15.

186. The parties settled out of court on October 19, 1970 for $1.4 million, of which $950,000 was to be returned to the class by a reduction of taxicab fares below the then existing maximum authorized fares. The defendants agreed to reduce fares in a minimum amount of $95,000 annually until the total fare reduction was completed. The remainder of the settlement was designated as attorneys' fees. Stipulation for Settlement and Judgment on file with the *Michigan Law Review*.

The superior court held hearings on the fairness of the settlement, and judgment was entered on May 3, 1971. The final settlement, entered as a judgment, differed in several respects from the original settlement agreement and provided for $200,000 in attorneys' fees. The Board of Public Utilities and Transportation of the City of Los Angeles was charged with the duty of overseeing compliance with the judgment. The plaintiff recommended this form of recovery because it was feared that the cost of administering and supervising claims would consume a disproportionate amount of the money recovered in judgment. Letter from Leon Perlsweig, an attorney for the plaintiff, on file with the *Michigan Law Review*.

Despite its suggestive language, *Daar* is uncertain authority for any fluid class recovery. The California supreme court stated at two points in the decision that individuals damaged by the overcharge must ultimately prove separate claims.[187] In a subsequent case, that court averred that *Daar* requires individual demonstration of damages.[188]

As support for the use of a fluid class recovery, the *Eisen* court also cited the antibiotic drug cases. In *West Virginia v. Chas. Pfizer & Co.*,[189] sixty-six civil suits alleging violation of the Sherman Act were consolidated in one class action.[190] The defendant drug manufacturers offered a settlement of 100 million dollars, which was accepted by the majority of plaintiffs and submitted to the court for approval under Rule 23(e).[191] The plaintiffs proposed various distribution schemes, the most important of which was the "Alabama Plan," which formed the basis for the plan later adopted by the defendants. Under that distribution plan, 37 million dollars was allocated for consumers, who were represented by governmental entities.[192] The court quoted approvingly from the "Alabama Plan":

> After payments to individual consumers who have filed claims in accordance with the Court's notice are deducted from each entity's consumer fund, the balance, if any, should be held for distribution in accordance with each entity's internal, or second-stage allocation plan. Most entities joining in this allocation plan will seek court approval in their second-stage allocation plans for an additional period of time within which individual consumers may be permitted to file claims. Others may seek court approval to use the balance of their consumer fund for a public health purpose. The Court has the power, and, of course, should exercise its equitable control over these funds for the benefit of all consumers.[193]

The foundation for this second-stage plan had been laid in 1969 when notice by publication had been given to the consumer class members informing them that a failure to file claims by August 16, 1969, would constitute authorization to whatever government official was their representative to use the funds in a manner designed to

187. 67 Cal. 2d at 706, 713, 433 P.2d at 740, 745, 63 Cal. Rptr. at 732, 737.

188. Vasquez v. Superior Court, 4 Cal. 3d 800, 815, 484 P.2d 964, 973, 94 Cal. Rptr. 796, 805 (1971).

189. 314 F. Supp. 710 (S.D.N.Y. 1970), *affd.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 40 U.S.L.W. 3166 (U.S. Oct. 12, 1971).

190. The actions were instituted by various governmental entities and representatives of wholesalers and retailers. 314 F. Supp. at 721-22.

191. *See* note 2 *supra*.

192. The balance of the fund was allocated primarily to governmental agencies to compensate for institutional purchases (50 million dollars) and vendor reimbursement programs (10 million dollars). 314 F. Supp. at 728.

193. 314 F. Supp. at 728.

benefit the citizens of the state.[194] The propriety of allowing the states to recover damages through their attorneys general on behalf of individual consumers who had not filed claims was challenged on appeal by dissatisfied members of the class.[195] The Second Circuit Court of Appeals affirmed the lower court decision that approved the settlement.[196]

The settlement procedure adopted in the drug cases is significant because the court had before it data from which it could reasonably predict the amount of damages that seemed destined to go unclaimed by consumer members of the class. At the time the settlement was approved, after the deadline for filing claims, 38,000 customers had filed claims with an aggregate face amount of more than 16½ million dollars.[197] Nevertheless, the court felt it within its power to allocate over fifty per cent of the settlement fund to the states in accordance with their intent to use the fluid class recovery for some public health purpose.

Seven states refused to accept the defendant's offer to settle and were excluded from the settlement agreement in *Pfizer*. Their causes of action were assigned for completion of pretrial proceedings.[198] Although Judge Tyler did not consider these proceedings in his analysis of the fluid class recovery in *Eisen*,[199] the proceedings were examined in *City of Philadelphia* as additional precedent for the fluid class recovery in large consumer class actions.[200]

The seven states sought to represent two classes, governmental entities that had purchased antibiotics for their own use or for institutional purposes[201] and retail purchasers of drugs.[202] As to this latter consumer class, the court concluded that the requirements of Rule 23(a) were satisfied and that the common issues predominated over individual issues as required by Rule 23(b)(3).[203] Although the

194. 314 F. Supp. at 724-25.

195. 440 F.2d at 1089. The appeal was taken by the wholesaler-retailer portion of the class. Of the settlement offer, only 3 million dollars, which the court admitted was an arbitrary "nuisance value allocation," was apportioned to this subclass. By passing on the illegal overcharges to its customers, this subclass may not have suffered any damages. *See* 314 F. Supp. at 728.

196. 440 F.2d at 1092.

197. 314 F. Supp. at 728.

198. *In re* Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Antibiotic Drugs, 5 CCH TRADE REG. REP. ¶ 73,398 (J.P.M.L. 1970).

199. Judge Tyler spoke of the "Drug Cases," but he apparently considered only 314 F. Supp. 710 (S.D.N.Y. 1970). *See* 52 F.R.D. at 259.

200. 53 F.R.D. at 64-66.

201. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 5 CCH TRADE REG. REP. ¶ 73,481 (S.D.N.Y. 1971).

202. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 5 CCH TRADE REG. REP. ¶ 73,482 (S.D.N.Y. 1971).

203. 5 CCH TRADE REG. REP. ¶ 73,482, at 89,960.

court felt that a sufficient showing had been made "to warrant the establishment of the proposed classes,"[204] the order was conditioned on a showing that the actions were manageable and that satisfactory notice could be provided.[205] On the issue of damage calculation, the court tentatively concluded that the amount of damages suffered by class members could be determined by estimating gross damages instead of aggregating individual damage claims.[206]

In an opinion directed primarily to the requirements of Rule 23(b)(3)(D) and the manageability problems presented, the court rejected the defendants' contention that an assessment of gross damages would violate their rights to a jury trial and due process.[207] Denying the defendants' claim that a class-wide recovery would result in a windfall to which the plaintiffs were not entitled, the court stated:

> If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the "pot of gold" created by their illegal activities. And the success of their scheme and the size of the "pot" would certainly be no basis for leaving the money in their hands.[208]

The court did have difficulty in deciding whether damages proved through a calculation of total damages, but unclaimed by individual members, should be given to the states for the benefit of the absent class members.[209] The court concluded that Rule 23 does not require that the funds be given to the class representatives, although it recognized that the alternative of returning unclaimed damages to the defendants was unattractive. It deferred consideration of the disposition of the residue until such time as the issue actually arose.[210] Nevertheless, these pretrial orders are important steps in the acceptance of the fluid class recovery because of the express holding that calculation of damages by establishing the total damages suffered by the class as an entity preserves the due process rights to which the defendants are entitled.

Taken together, the above cases do provide reasonable precedent

204. 5 CCH TRADE REG. REP. ¶ 73,482, at 89,959.

205. 5 CCH TRADE REG. REP. ¶ 73,482, at 89,962.

206. 5 CCH TRADE REG. REP. ¶ 73,482, at 89,960-61.

207. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 5 CCH TRADE REG. REP. ¶ 73,699, at 90,914 (S.D.N.Y. 1971).

208. 5 CCH TRADE REG. REP. ¶ 73,699, at 90,913.

209. The court seemed concerned that awarding the residual to the states would constitute tacit recognition of the parens patriae concept. The court had previously denied the parens patriae claims raised by the states "without prejudice to renewal at a later date in the event of a decision by the Supreme Court . . . in Hawaii v. Standard Oil Co., 431 F.2d 1282 (9th Cir. 1970)." 5 CCH TRADE REG. REP. ¶ 73,699, at 90,913 n.6. Oral argument was heard in *Standard Oil* and is noted at 40 U.S.L.W. 3189 (U.S. Oct. 26, 1971).

210. 5 CCH TRADE REG. REP. ¶ 73,699, at 90,913-14.

for the use of a fluid class recovery. *Bebchick*, *Daar*, and *Eisen* involved activities that are regulated by a commission. Both *Bebchick* and *Eisen* recognize the supervisory authority that will be exercised over the period of time necessary to deplete the damage fund.[211] When no such regulatory or enforcement body exists to police the administration of the fluid class recovery, it is not clear that the courts will be providing a more manageable solution of the distribution dilemma by employing a fluid class recovery.

The drug cases, while offering perhaps the strongest support for the authority of a court to fashion a fluid class recovery, do not, however, suggest a solution to the manageability problems that will fall on a court that authorizes a fluid class recovery when no supervisory agency is present. In the drug cases, governmental entities were the class representatives, and the residual was to be returned to them to be used at their discretion for public health purposes.[212] It is difficult to imagine representatives who might be better able to use the funds to benefit the class members. Governmental entities are as well equipped as the Public Utilities Commissions or the SEC to assure actual return of the fund balance to the consumer class. Therefore, although the three cases cited by Judge Tyler do provide precedent for the use of the fluid class recovery in *Eisen*, none of the cases suggests whether a court would authorize a fluid recovery when the class representatives are individual consumers or purchasers and when the nature of the activity involved thrusts the court into an active role policing the decree over the time needed to deplete the fund.

2. *Applicability of the Fluid Class Recovery*

In discussing the applicability of the fluid class recovery, both the *Eisen* and *City of Philadelphia* courts felt that such a recovery was appropriate only in those situations in which, because of the high decree of repetitive activity by the members of the class, the court could be assured that the same persons who had incurred damages would receive the benefits of the distribution. In *Eisen* the court believed that there was a sufficiently high level of repetitive activity to ensure that the individuals injured in past odd-lot transactions would largely recoup their damages through future odd-lot dealings with the defendants at lower differentials.[213] Conversely, in *City of Philadelphia* the court was concerned about the windfall that would accrue to the large number of new motorists who entered the relevant market subsequent to the alleged illegal activity; it

211. 318 F.2d at 204; 52 F.R.D. at 265.

212. *See* text accompanying note 193 *supra*.

213. 52 F.R.D. at 265.

concluded that the composition of the class of motorists had changed sufficiently so as to rule out the application of a fluid class recovery.[214]

However, it is by no means certain that lack of repetitive activity should limit the application of the fluid class recovery. Focusing for the moment on the illegal conduct of the defendant, it is clear that a remedy that requires a defendant to relinquish the fruits of its illegal activity has a substantial *in terrorem* effect.[215] When, because of the changing components of the market, a defendant is permitted to engage in illegal activity without the constraint of a potential liability for the full amount of illegal gains, the temptation to engage in such activity is strongest. In the antitrust field, the provision for recovery of treble damages[216] and the frequent judicial pronouncements of the valuable service that private enforcement of the antitrust laws provides[217] are recognition of the substantial value of a remedy that bears some relation to the damages suffered by the plaintiff, but also looks to the deterrent effect on the defendant. In other areas of the law, decidely noncompensatory damages may be recovered because a straight compensatory remedy would not act as an adequate deterrent.[218]

Wide application of the noncompensatory principle would, however, result in an unwarranted intrusion into areas traditionally reserved for criminal statutes. Consumer class actions are likely to arise from contractual relationships, and damages should be subject to the general contractual standard of compensatory, nonpunitive recovery.[219] It may of course be argued that a fluid class recovery is compensatory in the sense that the damages awarded represent only the amounts that will make the members of the class whole. But it should be clear that the distribution is punitive from the defendant's perspective when the repetitive level is so low that the persons who have suffered damages will not be the beneficiaries of the residual funds. To avoid this result, the requirement that a court find some level of repetitive activity before implementation of a fluid class recovery is a reasonable restraint on its utilization.

Although it is clear that some repetitive activity should be a prerequisite, the difficult problem arises in attempts to determine the

214. *See* text accompanying note 111 *supra*.

215. *See* Pomerantz, *supra* note 172.

216. 15 U.S.C. § 15 (1970).

217. *E.g.*, Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

218. *See, e.g.*, ARK. CONST. art. 19, § 13:

> Usury—Legal Rate.—All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum.

219. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 81, at 286-92, § 137, at 560-62 (1935).

exact quantum of repetitive activity necessary to sustain a fluid class recovery scheme. Any demand for a high level of repetitive activity must be balanced with the realization that in many class actions the refusal to certify the class is tantamount to an absolute denial of recovery. In *Eisen* the court found that the number of persons engaging in odd-lot transactions increased by about five per cent in each of the two years following the period during which the alleged illegal differentials were charged.[220] Assuming this rate of increase has continued, in the five years since initiation of the suit the number of "new" persons entering the odd-lot market constitutes twenty per cent of the present market. Such calculations do not take into account the cessation of odd-lot transactions by some members of the 1962-1966 class so that any fluid class recovery would benefit a large number of persons, and a substantial percentage of persons relative to the represented class, who did not suffer damages during the period of alleged illegal activities by the defendants. Yet the court in *Eisen* concluded that the level of repetitive activity made a fluid class recovery possible. In contrast to *Eisen*, the court in *City of Philadelphia* refused to authorize a fluid class recovery because of a lack of repetitive activity. One of the more confusing statements in the opinion is the assertion that a fluid class recovery, which results in a windfall to some motorists, would constitute "a deprivation to the motorist entitled to recovery."[221] It is difficult to envision the fluid class recovery as a deprivation to the consumer motorist class when even the court admits that denial of certification will mean that none of the nongovernmental members of the Philadelphia-New Jersey class will be able to recover damages. This paradox illustrates that a requirement of a strict level of repetitive activity decreases the opportunity to use a fluid class recovery, and, more importantly, results in denying recovery to *any* member of the consumer class on the ground that recovery by all is not possible. The court in *City of Philadelphia* made no specific findings of the degree of repetitive activity present in the relevant market, and therefore no quantitative comparison with the *Eisen* case is possible. But the very fact that the only alternative to a fluid class recovery will often be no recovery at all should persuade courts to avoid an unreasonably high standard for repetitive activity.

3. *The Fluid Class Recovery in Perspective*

The fluid class recovery does provide an alternative to the calculation of individual damages in class actions, and in that sense

220. 52 F.R.D. at 257.

221. 53 F.R.D. at 72.

it dramatically reduces the drain on court resources and assists in the management of large consumer class actions brought under Rule 23(b)(3). But the fluid class recovery also has limitations that, while not decreasing its advantages when implemented, limit the occasions when it will be used. These limitations arise from the nature of the commercial activity in which a defendant may be engaged.

The most obvious prerequisite to implementation of a fluid class recovery is the calculation of gross damages. The entire concept of the fluid class recovery revolves around the establishment of a damage fund from which payments for individual claims and litigation expenses are deducted. In some industries the pricing structure may be based on such a multitude of variables that calculation of gross damages is precluded because of an inability to establish an average margin or typical overcharge. "[T]he key to defendants' arguments"[222] in *City of Philadelphia* was the complexity of the gasoline pricing structure. The court concluded that calculation of individual damages would be impossible even if gross damages could be established. Indeed, the complexity in pricing suggests that even gross damages would have been indeterminable, and such a finding would have precluded the application of a fluid class recovery.

The requirement of a significant level of repetitive activity will also serve to reduce the occasions on which a fluid class recovery will be utilized. But the class action is itself a creature of necessity, and for this reason the policy of conforming to compensatory principles of damage calculation is likely to give way to the maintenance of class actions in those situations where failure to allow a fluid class recovery denies recovery to all.

The most serious limitation to the use of the fluid class recovery will arise in those cases in which the residual fund is to be returned to the class over a substantial period of time and the class representative is ill equipped, and no independent regulatory agency exists, to supervise the return of the fund by the defendant. There will be times when the anticipated burden of continuing court responsibility in enforcement of the damage decree will dictate that a class action not be certified. But none of these limitations can detract from the contribution that the concept of a fluid class recovery makes to decreasing the manageability problems that would otherwise arise in many large consumer class actions. The strength of the fluid class recovery lies in the implicit recognition that class actions are different from the ordinary adversary proceeding and require innovative procedures if they are to be fully effective.

222. 53 F.R.D. at 58.